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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 ANIMAL LEGAL DEFENSE FUND, a
16 California corporation; and REGAL
17 VEGAN, INC., a New York
18 corporation;

19 Plaintiffs,

20 – against –

21 HVFG LLC, a New York limited
liability company;
MARCUS HENLEY, an individual;
MICHAEL GINOR, an individual;
IZZY YANAY, an individual; and
RICHARD BISHOP, an individual;

22 Defendants.

23 Case No. C 12-05809 WHA

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DEFENDANTS' REPLY BRIEF IN
SUPPORT OF MOTION TO
DISMISS FOR FAILURE TO
STATE A CLAIM UNDER FRCP
12(b)(6)

Date: April 4, 2013
Time: 11:00 a.m.
Place: Courtroom 8

Hon. William H. Alsup

INTRODUCTION

Unable to point to any allegations that either of them sells foie gras or any other competing product made from foie gras that could give them standing to sue Hudson Valley under the Lanham Act, Plaintiffs spend half their opposition brief trying to define a market in which Regal Vegan’s “food product” could be imagined to compete with Defendants’ foie gras. In doing so, Plaintiffs ignore the most salient facts and holdings from this circuit’s leading false advertising cases and reveal that their self-described “novel” lawsuit lacks any merit. No matter how they try to spin it, Plaintiffs cannot fairly allege that an animal rights group or the seller of a “plant-based” food product (or even of a “humane pâté,” assuming they had ever alleged that) has statutory standing to maintain a false advertising action against a foie gras producer under the Lanham Act.

In the second half of their brief, Plaintiffs take the position that the term “humane” is somehow a statement capable of being verified as true or false. The Court should note that Plaintiffs do nothing to respond to, let alone distinguish, the many authorities in Defendants’ moving papers that clearly establish that such a statement is not a “specific and measurable claim, capable of being proved false or reasonably interpreted as a statement of objective fact” — as opposed to the highly subjective general expression of opinion (or, at worst, puffery) that it is. Even if Plaintiffs could conjure up Lanham Act standing, their legal theory of liability must fail as a matter of law.

Plaintiffs’ lawsuit is based on an untenable legal theory that an animal rights group and a producer of a “plant-based” product — both of whom contend that modern agricultural methods and the consumption of animals are inherently “inhumane” — are somehow “competitors” of a foie gras producer for false advertising purposes under the Lanham Act such that they should be allowed to challenge a farmer’s use of the term “humane” in its slogan. Because it would be futile to invite Plaintiffs to try to cook up new allegations that would state a claim under the Lanham Act, Defendants’ motion to dismiss should be granted without leave to amend.

ARGUMENT¹

I. Plaintiffs fail to point to any allegations in the complaint that would give them statutory standing under the Lanham Act.

Faced with the reality that they do not sell foie gras or any other competing product, Plaintiffs start their opposition with the claim that “‘direct’ or ‘actual’ competition is not the standard in the Ninth Circuit.” (Opp. at p. 7, ln. 10.) Yet this flies in the face of the Ninth Circuit’s holding in *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2005). While the court in that case noted that there is no requirement that the parties be competitors “in the traditional sense” *for false association claims*, it held that, because the Jack Russell Terrier Network of Northern California was not a direct competitor of the Jack Russell

¹ As explained in the Prefatory Note in Defendants' moving papers — and contrary to what Plaintiffs suggest (Opp. at 22, lns. 21-25) — Defendants set this motion to dismiss under FRCP 12(b)(6) for hearing on the same date and time as their motion to dismiss under FRCP 12(b)(1) specifically to honor the preference implied by the Court at the initial case management conference for having all such motions heard at the same time. Defendants timely filed the Notice of Motion and Motion, which included a Statement of Issues to Be Decided (ECF Dkt. No. 38), on Thursday, February 28th, i.e., 35 days before the previously scheduled hearing, but did not file the balance of the motion until the motion was re-filed in its entirety the next morning at 10:39 a.m. (ECF Dkt. No. 39). (The Court's docket clerk then asked that it be re-filed using a different "event" category. [ECF Dkt. No. 40].)

To cure this brief delay of a matter of hours, at the time the motion was re-filed, Defendants' counsel calendared the due date for Plaintiffs' opposition for the full 14 days later in order to provide them with their full time to respond as required by Local Rule 7-3(a). (ECF Dkt. No. 40). (So as not to affect the time for the Court to review the parties' submissions, Defendants calendared their own reply brief for just six days after Plaintiffs' opposition due date, i.e., 14 days before the hearing.) Plaintiffs thus had a full 35 days' notice of the motion and had a full 14 days to prepare their opposition as provided by the Local Rules. Other than to claim that this picayune procedural wrinkle somehow renders Defendants' entire motion "invalid" (Opp. at 22, lns. 20-21), Plaintiffs do not identify a whit of prejudice, and, having filed a full opposition, they expressly agree to appear at the hearing to argue the merits of the motion. Despite Plaintiffs having devoted a page of their brief to it (and having necessitated this response to set the record straight), this is a non-issue.

1 Terrier Club of America, the plaintiff lacked standing to bring a *false advertising* claim.
 2 *Id.* at 1037. Plaintiffs' argument is also directly contradicted by recent district court
 3 decisions, such as *Jurin v. Google*, which explains that “[a] ‘competitive injury’ occurs
 4 when a *direct competitor* harms the plaintiff’s ability to compete with it in their *shared*
 5 *marketplace.*” 768 F.Supp.2d 1064, 1072 (E.D. Cal. 2011) (emphasis added).

6 **A. ALDF does not sell anything and does not compete with Defendants in
 7 any market.**

8 Plaintiffs admit that ALDF does not sell anything at all, but they still claim that it
 9 has Lanham Act standing to sue a producer of foie gras. Such a claim exemplifies the
 10 frivolousness of Plaintiffs' positions in this case. Plaintiffs argue that ALDF and
 11 Defendants compete “in the business of educating the public about the treatment of
 12 farm animals for food production” (Opp. at p. 2, lns. 12-13) or “in the business of
 13 educating the public about foie gras production practices” (Opp. at p. 10, lns. 11-12).
 14 In the first place, this allegation does not appear anywhere in Plaintiffs' complaint. But
 15 even more problematic for them, Plaintiffs have not alleged that either ALDF or any of
 16 the Defendants actually *sells* any information about foie gras; by definition, they are not
 17 vying for *any* dollars, let alone the same dollars from the same consumer group.

18 In partial recognition of how silly their claim is, Plaintiffs state that they
 19 “acknowledge the novel character of Lanham Act competition in this public education
 20 business.” (Opp. at p. 10, lns. 26-27.) Plaintiffs do not cite a single authority for their
 21 wishful notion that an animal rights group is a commercial competitor of a duck farm
 22 merely because they both provide free information about foie gras production. Indeed,
 23 since Plaintiffs do not (and cannot) allege that either they or Hudson Valley charge
 24 anything for the information they provide, “this public education business” does not
 25 even meet the *first* prong of the test for Lanham Act standing, i.e., *commercial* injury,
 26 let alone the requirement of a competitive one.²

27 ² There is more than a little irony in Plaintiffs' noting that “[o]ne of the primary
 28 reasons courts confined Lanham [sic] ‘to injury to a competitor’ was to keep it from
 becoming [sic] ‘federal statute creating the tort of misrepresentation.’” (Opp. at p. 11,

- 1 B. Regal Vegan does not sell foie gras and cannot establish Lanham Act
 2 standing based on its assertion that it competes with Hudson Valley in
 3 the market for “food products” — or even for “spreadable pâtés for
 4 consumers interested in animal welfare.”
 5 1. Despite Plaintiffs’ attempt to imagine a market in which they
 6 compete with Defendants, Regal Vegan cannot fairly allege that
 7 it competes with Hudson Valley or the individual Defendants.

8 In an attempt to avoid dismissal, Plaintiffs came up with a host of confused and
 9 conflicting definitions of the hypothetical market in which they believe Regal Vegan’s
 10 “food product” competes with Hudson Valley’s foie gras. In some places, they argue
 11 that Hudson Valley’s simple slogan has “impaired Plaintiffs’ ability to compete with
 12 Defendants *in the food product industry.*” (Opp. p. 7, lns. 16-17 [emphasis added].) In
 13 others, Plaintiffs claim that both Regal Vegan and Defendants are “selling the same
 14 product, paté.” (Opp. at p. 7, lns 24-25.) In still other places, they contend that Regal
 15 Vegan competes with Defendants “for consumers of humane ‘foie gras’ spreads” —
 16 despite the fact that Regal Vegan does not even sell any foie gras, let alone allege that it
 17 markets *its* product as “humane.” (Opp. at p. 7, lns. 20-21.) Then, pages later,
 18 Plaintiffs change their tune again and posit that the market in which they believe Regal
 19 Vegan competes with Hudson Valley should be defined as the market for “spreadable
 20 pâtés for consumers interested in animal welfare.” (Opp. at p. 9, lns. 27-28.)

21 First of all, none of these arguments or definitions is even consistent with the
 22 allegations in Plaintiffs’ complaint. In the complaint, Plaintiffs alleged that “[t]he
 23 market for Faux Gras is adversely affected by the availability of force-fed foie gras.”
 24 (Compl. ¶ 10 [emphasis added].) The only other shared marketplace to which Plaintiffs
 25 even adverted in their complaint is the market for “food products.” (Compl. ¶ 10, lns.

26 lns. 1-4, quoting *Halicki v. United Artists Commc’ns., Inc.*, 812 F.2d 1213, 1214 (9th
 27 Cir. 1987). Yet that is essentially what Plaintiffs are asking this Court to do. If anyone
 28 who disagreed with a statement made by a business or its employees could simply
 29 provide “rival” information to the public at no charge and sue for false advertising, it
 30 would result in “the complete dilution of the concept of unfair competition” that the
 31 Lanham Act is designed to prevent. See *Halicki*, 812 F.2d at 1214.

1 20-22.) Based on the myriad conflicting positions they take in their opposition, it
 2 should be obvious that — whether it be “food products,” “patés,” “humane ‘foie gras’
 3 spreads,” or “spreadable patés for consumers interested in animal welfare” — Plaintiffs
 4 cannot fairly allege that Regal Vegan’s product competes with Hudson Valley’s foie
 5 gras. As Defendants previously pointed out, this Court has held that, even though
 6 parties may compete in the same broad market, that does not make them competitors
 7 for purposes of standing under the Lanham Act. *Brosnan v. Tradeline Solutions, Inc.*,
 8 681 F. Supp. 2d 1094 (N.D. Cal. 2010).

9 Plaintiffs also argue that Regal Vegan competes with Defendants because, in
 10 Plaintiffs’ view, they “vie for the same consumer dollars from the same target audience,
 11 purchasers who care about the humane treatment of animals raised for food
 12 production.” (Opp. at p. 7, lns. 25-27; p. 10, lns. 20-22.) This argument is absurd,
 13 especially considering that Plaintiffs themselves have not even alleged that Regal Vegan
 14 markets its product as “humane.” And if “spreadable” products for “people who care
 15 about animals” were enough to define a shared marketplace in which Regal Vegan were
 16 given standing to sue a foie gras producer under the Lanham Act, then the same flawed
 17 logic would extend to allow, for example, the makers of Skippy peanut butter —
 18 another “spreadable” “plant-based” food product — to sue Hudson Valley as well.

19 **2. Plaintiffs’ references to *Kournikova* and *Alkayani* are misplaced
 20 if not totally misleading because those cases involved
 21 competitors selling the *same products*.**

22 Plaintiffs cite only two cases in their attempt to liken Regal Vegan’s claim to a
 23 legitimate Lanham Act lawsuit. Faced with the fact that Regal Vegan and Hudson
 24 Valley sell entirely different products, Plaintiffs first suggest that Regal Vegan can be a
 25 competitor of Hudson Valley “even if they are in entirely different industries.” (Opp. at
 26 p. 8, lns. 2-3.) Plaintiffs would have this Court believe that the court in *Kournikova v.*
General Media Communications, Inc., 278 F.Supp.2d 1111 (C.D. Cal. 2003), found
 27 that “a celebrity athlete was a competitor with a magazine” simply because the parties’
 28

1 target audience was “men.” (Opp. at p. 8, lns. 3-10.) Yet, contrary to what Plaintiffs
 2 suggest, the court in *Kournikova* held that Anna Kournikova and GMC, the publisher
 3 of *Penthouse*, were competitors because GMC “markets a variety of videos and
 4 calendars” of women wearing little or no clothing and because Kournikova “likewise
 5 markets videos and calendars” of women in bathing suits such as herself and Pamela
 6 Anderson (and did so through the same channels). *Id.* at 1118-19. Nonetheless, the
 7 court went on to find that Kournikova’s prospect of showing a “competitive injury”
 8 was “remote” and that — like Regal Vegan’s claim here — her false advertising claim
 9 therefore had to be dismissed. *Id.* at 1119.

10 Plaintiffs also suggest that *Alkayali v. Geni, Inc.*, 2007 WL 2315436 (C.D. Cal.
 11 Apr. 11, 2007), somehow helps them establish standing. (Opp. at p. 9, ln. 15.) They
 12 argue that the *Alkayali* court found the parties to be competitors despite the fact that
 13 the plaintiff’s product “contained a very different formulation” from the defendant’s
 14 product and that this should lead the Court here to conclude that Regal Vegan’s “plant-
 15 based” food product similarly competes with foie gras. (Opp. at p. 9, lns. 18-22.) But
 16 Plaintiffs curiously omit the most critically relevant fact in the *Alkayali* case, which is
 17 that that “both *Alkayali* and Defendants market[ed], promote[d], and [sold]
 18 pomegranate extract products.” *Alkayali*, 2007 WL 2315436 at *2. *Alkayali* would
 19 only be “very similar to the current case” (Opp. at p. 9, ln. 16) if both Regal Vegan and
 20 Hudson Valley both sold foie gras, which, by Plaintiffs’ own allegations, they obviously
 21 never will.

22 **C. Because neither Plaintiff even competes with Hudson Valley, neither
 23 Plaintiff has standing to sue the individual Defendants.**

24 A ruling by this the Court that Plaintiffs do not compete with Hudson Valley —
 25 and thus lack standing to bring a false advertising claim under the Lanham Act —
 26 would necessarily warrant the dismissal of this action against the individual Defendants,
 27 who do not sell anything in their individual capacities but are simply affiliated with
 28 Hudson Valley.

1 D. Plaintiffs are wrong that a finding of statutory standing as to either
 2 Plaintiff is sufficient to deny the motion to dismiss as to both.

3 Plaintiffs state, “If the Court finds that either Plaintiff has statutory standing, it
 4 need not, as a matter of judicial efficiency, conduct a full standing analysis for the
 5 second.” (Opp. at p. 11, lns. 18-19.) This is just plain wrong and makes one wonder
 6 whether Plaintiffs even looked at the cases that they cited. In *Leonard v. Clark*, 12 F.3d
 7 885, 888-89 (9th Cir. 1993), the Ninth Circuit clearly addressed only *Article III*
 8 *standing* (i.e., the subject of Defendants’ concurrent motion to dismiss under FRCP
 9 12(b)(1)), not statutory standing. In fact, neither *Leonard* nor the Supreme Court case
 10 it cites even mentions statutory standing (and neither involves Lanham Act claims, for
 11 that matter). In any event, for the reasons explained above, *neither ALDF nor Regal*
 12 *Vegan* meets the “competitive injury” requirement for standing under the Lanham Act
 13 in the first place.

14 II. Plaintiffs do not even respond to Defendants’ points and authorities about
 15 “The Humane Choice” or “humane” being subjective expressions of
 16 opinion, as opposed to a “specific and measurable claim, capable of being
 17 proved false or reasonably interpreted as a statement of objective fact.”

18 Defendants devoted a considerable portion of their opening brief to discussing
 19 the various cases that illustrate why terms like “humane” and “the Humane Choice”
 20 are not statements of *fact* that can form the basis of a valid claim for false advertising
 21 under the Lanham Act. (Motion at p. 15-19.) One might have expected some effort
 22 from Plaintiffs to distinguish Defendants’ multiple authorities or to try to counter the
 23 logic of Defendants’ arguments. Yet Plaintiffs’ opposition completely ignores the key
 24 holdings in the Ninth Circuit, which make clear that a slogan referring to a company as
 25 “humane” is not a “specific and measurable claim, capable of being proved false or
 26 reasonably interpreted as a statement of objective fact.” Plaintiffs ignore this entire
 27 section because, well, they have to, or else they will lose this case.

28 The closest Plaintiffs come to addressing Defendants’ arguments is their
 contention that Defendants’ claims should be considered in context with “their other

1 advertising” to determine whether they are factual statements. (Opp. at 12-13.)
 2 Plaintiffs pick pieces from *Pizza Hut, Inc. v. Papa John’s International, Inc.*, 227 F.3d
 3 489, 495 (5th Cir. 2000), in an attempt to concoct their own legal standard for what
 4 constitutes an actionable statement of fact. For instance, Plaintiffs note that the Fifth
 5 Circuit in *Pizza Hut* suggested that statements “must be viewed in the light of the overall
 6 context in which [they] appear[].” (Opp. at p. 12, lns. 19-11.) But Plaintiffs fail to
 7 mention that *Pizza Hut* emphasized that, for a statement of fact to be actionable, it must
 8 be “one that (1) admits of being adjudged true or false in a way that (2) admits of
 9 empirical verification.” *Pizza Hut*, 227 F.3d at 496 (quoting *Presidio Enters., Inc. v.*
 10 *Warner Bros. Distrib. Corp.*, 784 F.2d 674, 685 (5th Cir. 1986)). By omitting this
 11 crucial rule and failing to respond to Defendants’ arguments regarding whether their
 12 statements are ones of fact or opinion, Plaintiffs presumably hope to avoid having to
 13 explain to this Court how a claim that something is “humane” can possibly be adjudged
 14 “true or false.”

15 Plaintiffs further distort the facts of *Pizza Hut* in an attempt to analogize it to their
 16 own lawsuit. *Pizza Hut* involved direct comparison advertising. At issue in that case
 17 was the tag line “Better Ingredients. Better Pizza.” *Id.* at 498. Taken on its own, this
 18 slogan was a general statement of opinion “because the phrases ‘better pizza’ and
 19 ‘better ingredients’ are not subject to quantifiable measures.” *Id.* at 498-99. However,
 20 the Fifth Circuit found that, when the slogan was considered together with *a series of*
 21 *direct comparison advertisements* comparing specific ingredients used by Papa John’s
 22 with the ingredients used by its competitors, the jury’s finding that it was misleading
 23 and actionable was not unreasonable. *Id.* at 500. Moreover, unlike in *Pizza Hut*,
 24 where the slogan at issue became “quantifiable” in context with the specific comparison
 25 ads, here Defendants’ makes no direct comparison to Regal Vegan, let alone a
 26 “quantifiable” claim.

27
 28

A. Plaintiffs’ “numerous studies” do nothing to establish that Hudson Valley’s “Humane Choice” slogan is a statement of fact.

Plaintiffs spend a significant portion of their brief talking about various consumer surveys that purport to show a concern among some consumers for the welfare of animals. Defendants do not dispute that consumer surveys may go to the *materiality* of a specific, verifiable claim. But that only shows that some percentage of consumers “cares about how the animals are treated.” (Compl. ¶¶ 123-34.) Whether some consumers care about how animals are treated, however, does nothing to render the terms “humane” or “The Humane Choice” verifiable or quantifiable. Thus, this type of survey evidence cannot be used to convince the Court to determine as a matter of law that a statement is a matter of fact rather than a matter of opinion.

B. Plaintiffs misunderstand Ninth Circuit authority on the test for demonstrating falsity within the meaning of the Lanham Act.

“To demonstrate falsity within the meaning of the Lanham Act, a plaintiff may show that the statement was literally false, either on its face or by necessary implication, or that the statement was *literally true* but likely to mislead or confuse consumers.” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997), citing *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 943, 946 (3d Cir. 1993). Plaintiffs cannot establish that Hudson Valley’s slogan “The Humane Choice” (or other references to itself as “humane”) is “specific and measurable claim, capable of being proved false or reasonably interpreted as a statement of objective fact” — as opposed to the highly subjective general expression of opinion. So Plaintiffs suggest that cases like *Southland Sod Farms* allow them to get past the pleading stage by offering evidence that such a statement is “likely to mislead or confuse consumers.” (Opp. at p. 15.) But that is a misstatement of the rule for claims that are not literally false. *Southland Sod* specifically stated that, in order for a statement to be evaluated for its potential to mislead or confuse consumers, it must be “*literally true* but likely to mislead or confuse.” Here, that alternative test is irrelevant because, as explained at length in

1 Defendants' moving papers, the statement at issue here about Hudson Valley being
 2 "humane" or "The Humane Choice" is not even capable of proof as true or false.³
 3

4 **III. Plaintiffs' complaint should be dismissed without leave to amend.**

5 As Plaintiffs recognize, dismissal is proper under FRCP 12(b)(6) where there is a
 6 "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a
 7 cognizable legal theory." (Opp. at p. 6, lns. 21-23.) Plaintiffs also acknowledge that
 8 leave to amend may be denied "when it is clear the deficiencies of the complaint cannot
 9 be cured by amendment." (Opp. at p. 21, lns. 27-28.) Yet Plaintiffs offer nothing to
 10 counter Defendants' position that any amendment would be futile here.

11 Plaintiffs refer to unspecified "survey evidence" and say that they "should at least
 12 have the opportunity to completely gather this evidence" to remedy the deficiencies in
 13 their complaint. (Opp. at p. 22, lns. 1-4.) Plaintiffs' complaint is already 27 pages long
 14 and includes 178 paragraphs with plenty of their favorite "survey evidence." No
 15 amount of additional "survey evidence" is going to turn them into sellers of foie gras
 16 (or of any other duck or liver product) to confer standing under the Lanham Act, and
 17 all the surveys in the world would not turn the word "humane" into an actionable
 18 statement of fact.

19 Finally, dismissal without leave to amend will not prejudice either ALDF or Regal
 20 Vegan in any way. As Defendants noted in their opening brief, Plaintiffs can always file
 21 a new lawsuit if either of them ever starts selling foie gras.

22 Dated: March 21, 2013

/s/ Michael Tenenbaum

23 Michael Tenenbaum, Esq.
 24 THE TENENBAUM LAW FIRM
 25 *Counsel for Defendants HVFG LLC,
 Marcus Henley, Michael Ginor, Izzy
 Yanay, and Richard Bishop*

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 28³ Defendants respectfully refer the Court to their objections to Plaintiffs' Request
 for Judicial Notice of irrelevant hearsay reports from the Better Business Bureau.